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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN C. ROHLER, III, ET AL., APPELLANTS

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
[illegible] C. LEE,
Assistant Attorney General,
[illegible] B. KILPATRICK,
THOMAS G. WILSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Question presented	2
Interest of the United States	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Cases:	
Abington School District v. *Schempp*, 374 U.S. 203	10–11
Americans United for Separation of Church & State v. *Bubb*, 379 F. Supp. 872	11
Hunt v. *McNair*, 413 U.S. 734	8, 10, 12, 13, 14
Lemon v. *Kurtzman*, 403 U.S. 602	7, 12
Meek v. *Pittenger*, No. 73–1765, decided May 19, 1975	7, 11, 12, 13
Tilton v. *Richardson*, 403 U.S. 672	6, 7, 8, 9, 11, 12, 13, 14
Walz v. *Tax Commission*, 397 U.S. 664	7
Constitution and statutes:	
United States Constitution:	
First Amendment	2, 4
Fourteenth Amendment	2
Higher Education Act of 1965, 79 Stat. 1219 *et seq.*, as amended; 20 U.S.C. 1001, *et seq.*:	
20 U.S.C. 1051–1056	2
20 U.S.C. (Supp. III) 1056	3
20 U.S.C. (Supp. III) 1070 e–1	3

589-864—75——1

Constitution and statutes—Continued
United States Constitution—Continued

	Page
20 U.S.C. 1087a–1087c	3
20 U.S.C. 1119–1119b–1	3
20 U.S.C. 1121–1129a	3
28 U.S.C. 2281	4
Maryland Annotated Code, Art 77A, §§ 65–69	2, 3–4, 11

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OCTOBER TERM, 1975

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A–1—A–34) is reported at 387 F. Supp. 1282.

JURISDICTION

The judgment of the district court was entered on October 21, 1974 (J.S. App. A–57—A–58). The notice of appeal was filed on October 25, 1974 (J.S. App. A–59) and probable jurisdiction was noted February 18, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Sections 65–69 of the Maryland Annotated Code, Art. 77A, are set forth at J.S. App. A–52—A–55.

QUESTION PRESENTED

Whether a Maryland statute which authorizes state grants to church-related colleges and universities, but which prohibits the use of those funds for sectarian purposes, violates the Establishment Clause of the First Amendment as applied to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The Department of Health, Education, and Welfare operates several programs of financial assistance to institutions of higher education which are in some respects similar to the assistance program established by the Maryland statute that is challenged in this case. The most significant of the federal programs is the Strengthening Developing Institutions Program authorized by Title III of the Higher Education Act of 1965, 79 Stat. 1223–1231, as amended, 20 U.S.C. 1051–1056, which provides for grants to developing institutions of higher education for institutional improvement in curriculum, faculty development, administration, and student services.[1] Like the Maryland statute,

[1] Other federal programs having features similar to the Maryland assistance program are the Veterans' Cost-of-Instruction

the Higher Education Act contains a restriction on the use of funds for sectarian purposes, *viz.*, "[n]one of the funds * * * shall be used for a school or department of divinity or for any religious worship or sectarian activity" (20 U.S.C. (Supp. III) 1056).

In fiscal year 1975 the appropriation for this program exceeded $110 million and grants were made to 207 institutions. A significant number of grants are made to institutions that appear to have some of the same church-related characteristics as the institutions involved in this case. Thus, this Court's decision is likely to have a significant impact on the operation of this federal program.[2]

STATEMENT

In 1971, a Maryland statute authorizing the payment of state funds to any private institution of higher education in the state that meets certain minimum criteria, and that does not award only seminarian or theological degrees, was enacted. Art. 77A, § 65, *et seq.*,

program (20 U.S.C. (Supp. III) 1070c–1), the Cooperative Education program (20 U.S.C. 1087a–1087c), the Improving Training Opportunities for Non-Higher Education Personnel program (20 U.S.C. 1119–1119a–1), the Training Programs for Higher Education Personnel (20 U.S.C. 1119b–1119b–1), and the Undergraduate Institutional Equipment program (20 U.S.C. 1121–1129a).

[2] The various other federal programs listed in n. 1, *supra*, will also be affected by the decision in this case to some extent. These programs differ from the Maryland statute in that generally in each case the grants are made for specific purposes. There are, however, elements of a general grant program present in each case that is essentially similar to the Maryland statute. The total fiscal 1975 appropriation for these programs exceeded $215 million.

Md. Ann. Code. The Act was amended in 1972 to provide that "[n]one of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Art. 77A, § 68A, Md. Ann. Code.

The assistance program established by the Act is administered by the Maryland Council for Higher Education. Initially, the Council screens grant applicants to eliminate those institutions that primarily award seminarian or theological degrees. The Council has also developed procedures to determine if grants have been used for sectarian purposes. Under these procedures, a verification is required from the president of the recipient institution, prior to receipt of a grant, that funds will not be improperly expended (J.S. App. A–48). One year later, a second, similar verification is required, together with a description of the uses to which the funds were put. A subsequent audit by the State may be made, if it is determined to be necessary (*ibid.*)

The plaintiff Maryland taxpayers brought this suit against the appropriate Maryland officials, and five allegedly church-related private colleges that have received grants under the statute, contending that the Maryland statute violated the Establishment Clause of the First Amendment (J.S. App. A–2—A–3).[3] Since plaintiffs sought to enjoin the operation of the statute on constitutional grounds, a three-judge court was properly convened under 28 U.S.C. 2281 (J.S. App. A–4). After trial that court made findings of fact

[3] There were eighteen private colleges in Maryland receiving State aid at the time this suit was filed.

(J.S. App. A–35—A–51) and, based on those findings, sustained the constitutionality of the Maryland statute by a 2–1 vote.

Each of the four institutions that remain parties in the case—Mt. St. Mary's, Loyola, Notre Dame of Maryland, and St. Joseph's—are affiliated with the Catholic Church and the majority of the students at those institutions are members of the Catholic faith.[4] The three-judge court found that, although the colleges were church-related, "at none of the defendants is religious indoctrination a substantial purpose or activity," and the encouraging of "spiritual development of the students" is a secondary objective of the schools (J.S. App. A–43, A–45). Thus, while religious exercises are held on each campus, attendance is not required. Although classes in some of the secular courses begin with a prayer, this occurs at the teacher's option, student participation is voluntary, and "there is no actual college policy encouraging prayer in class" (J.S. App. A–39).

The court further found that faculty hiring was not based upon religion, since at two of the schools no inquiry was made concerning the applicant's religion, while at the other two schools hiring is based mainly upon academic qualifications (J.S. App. A–40—A–41). In short, the court found that the defendant colleges operated their secular classes on the basis of

[4] One of the original defendants—Western Maryland College—terminated its affiliation with the Methodist Church after the suit was filed, and was dismissed from the suit. St. Joseph's College has ceased operations. Since, however, it received state funds in the past, it remains an appellee.

principles of academic freedom and without religious bias.[5]

Based upon the foregoing findings of fact, the court concluded that the Maryland statute was constitutionally valid under the applicable standards of this Court's Establishment Clause decisions. The court found that the statute had the secular purpose of saving the taxpayers' money which would otherwise have to be spent in expanding public institutions; that the statute did not have a primary effect of advancing religion because the schools were not pervasively sectarian; and that there were, in general, sufficient safeguards to ensure that funds were not used to support religious activity.

Finally, the court ruled that the statute did not result in excessive governmental entanglement in religion (J.S. App. A–14—A–23). It ruled that the defendant colleges were similar to those involved in *Tilton* v. *Richardson,* 403 U.S. 672 and that there was no constitutionally significant difference between the

[5] The court qualified its ruling with respect to religion and theology courses offered by the defendant institutions (J.S. App. A–12—A–13). Although it found that academic freedom prevailed in secular courses, the court was unable so to characterize theology and religion courses. Since these courses are mandatory and are taught by clerics, the court held that absent proof that the courses are offered as an academic discipline, state aid cannot be justified (J.S. App. A–13). Accordingly, the Maryland Council for Higher Education was directed to take steps to ensure that state funds are not used to support such courses (*ibid.*).

type of assistance upheld in *Tilton* and that available under the Maryland statute.[6]

ARGUMENT

The purpose of the Establishment Clause is to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668. This Court has developed three criteria to be applied in determining whether a statute authorizing public assistance to church-related institutions is consistent with the purpose of the Establishment Clause: such a statute must have a secular purpose; it must not have a primary effect of advancing religion; and it must not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602, 612–613; *Meek* v. *Pittenger,* No. 73–1765, decided May 19, 1975, slip op., p. 8. Moreover, "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution" (*id.* at p. 9).

In applying these criteria, the Court apparently has recognized that government financial assistance is less likely either to advance religion or to involve excessive entanglement with religion when the aid is extended to religiously-affiliated institutions of higher education than when it goes to primary or secondary

[6] Judge Bryan dissented, concluding that because the Act had the potential to advance religion and to create excessive entanglement, it violated the Establishment Clause (J.S. App. A–26—A–34).

schools. Cf. *Tilton* v. *Richardson*, 403 U.S. 672; *Hunt* v. *McNair*, 413 U.S. 734. The rationale of this distinction was explained in the plurality opinion in *Tilton*, where the Court upheld the constitutionality of construction grants under the Federal Higher Education Facilities Act of 1963 made to church-related colleges and universities for buildings and facilities used exclusively for secular educational purposes:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in precollege church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz v. Tax Comm'n, supra,* at 671. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal disciplines. Many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom. [403 U.S. at 685–686, footnotes omitted.]

The plurality opinion in *Tilton* further pointed out (p. 687) that "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." The record in the present case shows institutions which, although different in some respects from the institutions involved in *Tilton* (see *infra,* pp. 10–11), nonetheless have a similar basic secular mission.

The plurality opinion also pointed out (p. 687):

> Since religious indoctrination is not a substantial purpose of activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.

These considerations, too, are no less applicable to the colleges involved in this case than they were to the institutions involved in *Tilton.*

Since the appellants concede that the Maryland statute has a secular purpose (Br. 15),[7] the only remaining questions are whether the Act has a primary

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[7] This concession is well-founded in light of the district court's findings concerning the benefits that inure to the state from the existence of the private colleges (J.S. App. A–37—A–38). As in *Tilton*, the state grants serve to maintain opportunities for higher education. *Tilton, supra*, 403 U.S. at 678–679.

effect of advancing religion and whether it results in excessive entanglement between government and religion. Both questions must be answered negatively.

1. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair, supra,* 413 U.S. at 743. The aid provided under the Maryland statute does not have a primary effect of advancing religion.

a. The district court correctly concluded that the defendant colleges "conform closely to the colleges approved in *Tilton* v. *Richardson*" and that therefore they "are not so pervasively sectarian that aid would have a primary effect of advancing religion" (J.S. App. A–10—A–11). Courses are taught according to the principle of academic freedom and the faculties of the colleges "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (J.S. App. A–38). The district court found that the colleges hiring practices were consistent with the maintenance of academic freedom, since the main criteria for hiring are academic qualifications and not an applicant's religion (J.S. App. A–40—A–41).

The colleges are not sectarian simply because some instructors, without encouragement from the college administrations, elect to open classes with a prayer. Participation in the prayers is voluntary and the students involved are young adults. See *Abington School*

District v. *Schempp,* 374 U.S. 203, 252–253, 298, 316 (concurring and dissenting opinions of Justices Brennan and Stewart). The district court correctly concluded that the practice of optional classroom prayers does not diminish "the atmosphere of intellectual freedom which marks these colleges" (J.S. App. A–40).

The district court properly found that there was "clear and convincing evidence" that at these colleges, like the institutions involved in *Tilton* v. *Richardson, supra,* courses are taught " 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards' " (J.S. App. A–40).[8]

b. The district court also correctly found (J.S. App. A–11–A–12) that, aside from grants for religion or theology courses, which the court invalidated, the Act would not be used to finance "a specifically religious activity." Indeed, the Act expressly prohibits any aid from being used "for sectarian purposes." Art. 77A, § 68A, Md. Ann. Code. Compliance with this statutory prohibition is adequately ensured by the requirement that the presidents of recipient institutions verify the proper use of the funds both before and after receipt and submit a description of the use

[8] In *Americans United for Separation of Church & State* v. *Bubb,* 379 F. Supp. 872 (D. Kan.), a three-judge court found that colleges similar to those involved here were not pervasively sectarian. The finding that the defendant schools are not pervasively sectarian distinguishes *Meek* v. *Pittenger, supra,* No. 73–1765, decided May 19, 1975, since the schools in those cases had a "predominately religious character" (No. 73–1765, slip op., p. 13).

of the funds. A further protection against the use of funds for religious activities is provided by the possibility of a State audit.

Tilton v. *Richardson, supra,* 403 U.S. at 679, and *Hunt* v. *McNair, supra,* 413 U.S. at 744, demonstrate that a statutory limitation on the use of funds for sectarian purposes coupled with administrative safeguards, can provide sufficient assurance that public assistance will not have a primary effect of advancing religion. As the plurality opinion in *Tilton* stated (403 U.S. at 679):

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

2. Whether excessive government entanglement exists depends upon "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. Under these standards, the Maryland statute does not foster excessive government entanglement with religion.

Only three of the 17 colleges that receive aid under the Maryland Act are church-related. The present statute thus stands in sharp contrast to the Pennsylvania aid plan condemned in *Meek* v. *Pittenger, supra,* where more than 75 percent of the non-

public schools receiving aid were "church-related or religiously affiliated educational institutions"—a consideration that led the Court in *Meek* to describe "the primary beneficiaries" of the program as "nonpublic schools with a predominant sectarian character" (No. 73–1765, *supra,* slip op. at p. 14). In the present case, however, the "primary beneficiaries" of the Maryland program are wholly secular institutions, and the few colleges with sectarian affiliations are, as shown, basically secular in their orientation and operation. Moreover, unlike the statute involved in *Meek,* the Maryland Act does not provide any "massive aid" to church-related nonpublic schools (*ibid.*).

It is particularly significant that, as shown above (pp. 10–11, *supra*), the colleges involved in this case, like the colleges in *Tilton* and *McNair,* are not pervasively sectarian, since the degree of entanglement "varies in large measure with the extent to which religion permeates the institution." *Hunt* v. *McNair, supra,* 413 U.S. at 746. To repeat what was said in the plurality opinion in *Tilton* v. *Richardson, supra,* 403 U.S. at 687:

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. * * * Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.

While the grants authorized by the Maryland statute are more general than the facility construction grants involved in *Tilton* and the bonding authority involved in *McNair,* in view of the facts that the recipient colleges are not pervasively sectarian and that their secular course programs are marked by a commitment to the principle of academic freedom, the state grants are not impermissibly ideological.

Finally, there is no constitutionally significant difference between the church-government relationships in *Tilton* and *McNair,* and that present here. Although in those cases the form of assistance was essentially a single event, the relationships created were continuing because of the necessity for inspections of the facilities. The submission of verifications twice a year as required by the Maryland program, even if occasionally followed up with a simple State audit, do not result in a degree of contact between church and State that is greater than that required by the relationship in *Tilton.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
STEPHEN F. EILPERIN,
THOMAS G. WILSON,
Attorneys.

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